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No. 463

INTERSTATE COMMERCE COMMISSION v. THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL.

No. 464

THE PENNSYLVANIA RAILROAD COMPANY v. THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL.

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No. 473

UNITED STATES OF AMERICA v. THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

MOTION OF CANTON RAILROAD COMPANY TO AFFIRM

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The Appellee, Canton Railroad Company moves to affirm on the ground that the question presented is so unsubstantial as not to need further argument.

QUESTION PRESENTED

Were the decisions of the Interstate Commerce Commission regarding iron ore rates from the North Atlantic ports supported by adequate findings?

STATEMENT

The relevant facts are adequately set forth in the Motion to Affirm of The Baltimore and Ohio Railroad Company and Western Maryland Railway Company, and we adopt the Statement of Facts of those Appellees.

ARGUMENT

While the facts involved in the controversy over iron ore rates from the North Atlantic ports to differential territory are complex, the issue on this appeal is simple. The District Court, in reversing the decisions of the Interstate Commerce Commission, properly considered only the restricted question of whether the Commission followed proper procedures in reaching its decision. The Court concluded that the Commission did not make the essential findings on which to base its ultimate determinations. We believe this conclusion to be inescapable and readily demonstrable.

The I.C.C. decisions in this case are glaring examples of a predominant tendency on the part of the Commission to tailor its opinions with a view towards rendering them invulnerable on appeal rather than towards actually dealing with the disputed matters and resolving them in accordance with the evidence. Decisions which announce the only feasible rule — that the Courts are to restrict their interference with the operation of the administrative process and to reverse the determinations only where administrative bodies have not considered all the relevant factors

— have been seized upon as a basis for opinions which fail to come to grips with the problems before the I.C.C. but contain perfunctory references to practically every conceivable factor brought before the Commission.

In this case, for example, many pages in the Commission's reports are devoted to detailing *the contentions* of the various parties. Understandably, these contentions are often contradictory on matters of substantial relevance to the issues before the Commission. The Commission carefully avoids findings of fact which resolve such contradictions and contents itself with a simple conclusion that the rates in question are or are not shown to be just and reasonable.

Such statements of the arguments advanced by the contending parties and final announcements of decision omit any indication of what the facts actually were on which the Commission based its determinations.

It is an inescapable conclusion that in this particular proceeding the Interstate Commerce Commission early decided that there should be an analogy drawn, for purposes of rates for iron ore imported through the North Atlantic ports, to the *voluntary* system introduced and maintained by the railroads for domestic iron ore travelling through the Great Lakes and that, consequently, it was desirable to have equal rail rates, regardless of distance differences, from several North Atlantic ports to the consuming points in differential territory.

Facts presented in substantial volume by opponents of this objective, those interested in the continued welfare of the Port of Baltimore and of the railroads serving her, demonstrated the inappropriateness of the analogy and particularly the impropriety of a *compulsory* parity of rates to which the Baltimore carriers, unlike those serving Great

Lake ports, were unwilling to accede. Since those facts created awkward hurdles to a pre-determined conclusion on which the Commission had set its mind, it stated what were facts which could not be swallowed merely as contentions of the parties, and simply said yes or no to rates without explaining why these awkward facts could be ignored.

If such a technique may be employed by an administrative agency and it can justify any result reached without explanation simply by stating the "contentions" of all the parties and pretending that it somehow considered all such contentions, no protection against arbitrary administrative action remains. We respectfully submit that the District Court was right in refusing to sustain a decision which, as to Philadelphia, was not supported by adequate findings and which, as to New York, flew in the face of the only factual findings which could have been made.

The simple unavoidable truths, the consequences of which the Commission sought to escape by its dubious method of opinion preparation, are these:

1. The primary and indeed only substantial source of foreign ore which will be subject to competitive rail routing will be that originating in Labrador.* All substantial quantities of iron ore originating elsewhere, as, for example, in South America or Sweden, are controlled or imported by either the Bethlehem Steel Company or by the United States Steel Company. Each of these concerns has a tidewater plant, the former at Sparrow's Point in the Port of

* Liberia ore, for which choice of rail routing may be determined by rate relationships is expected to be imported at a rate of about 500,000 tons per year, as compared to estimates of 10,000,000 tons annually for Labrador ore. Liberia is closer by sea to New York and Philadelphia, than Baltimore, so that considerations dealt with in paragraph 3 below apply with respect to it as well.

Baltimore. the latter at Morrisville in the Port of Philadelphia. Economies through controlling unloading operations and through blending ores from various sources so outweigh rail rate considerations that these two companies will import through their tidewater plants regardless of rail rate differences. Thus, for example, Bethlehem Steel imports iron ore destined for its plant in Bethlehem, Pennsylvania, through Baltimore, although the rail rate from Philadelphia to Bethlehem is 53.8 cents per ton less than the rate from Baltimore. Overall iron ore importation statistics for the port of Baltimore apparently relied upon by the I.C.C. were irrelevant to the issues before that body because no elimination was made of tonnages consigned to the Sparrows Point plant and of other tonnages not subject to competitive considerations in choice of rail routing.*

2. Iron ore may be exported from Labrador only during a limited portion of the year. The ore carriers principally employed in the North Atlantic service for such carriage are owned or controlled by the consuming companies owning the Labrador deposits and their partner in that venture, the M. A. Hanna Coal & Ore Company. Speedy turn-around of the vessels involved is of prime importance and the shippers will inevitably prefer the port with the

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* Imported ore is sometimes consigned to other points in differential territory than the 17 here involved. Because the New York and Philadelphia railroads have permitted their iron ore rates to such other points to remain far above the usual differential from the Baltimore rates, shippers to such points inevitably route through Baltimore not only full cargoes to such other points, but cargoes destined partly to such points and partly to the 17 points as well. If rates to such other points had been reduced to show the proper relationship to Baltimore rates, tonnages consigned in whole or in part to such points would be relevant to the issues here. No such event occurred, however, so consignments to such points were not properly to be considered as subject to competitive routing depending on rates to the 17 points.

shortest sailing time from Labrador, assuming equal rail rates for the overland haul to the destinations in differential territory.

3. Round-trip sailings from Labrador to New York and to Philadelphia would require two days less time in the case of New York and 21 hours less time in the case of Philadelphia than a round-trip from Labrador to Baltimore. Operating charges of American flag ore carriers were estimated to be $2,000 per day.

4. Overland distances from Baltimore are significantly less than those from Philadelphia and New York, to the extent that rates related on the normal differential heretofore prevalent would create greater earnings for Baltimore railroads than for the railroads serving New York and Philadelphia. The existence of the differential rate structure for the North Atlantic ports for nearly 80 years prior to these proceedings bears excellent witness that distances between the three ports here involved substantially affect the cost of hauling to points in differential territory.

5. Experience with shipments of iron ore from Labrador for even the limited season of 1954 which was the only one for which statistics were available at the time the record closed demonstrated that, on a rail rate parity, Philadelphia was distinctly preferred by shippers from Labrador and, by reason of rail rate parity and ocean shipping advantage, Philadelphia was not merely competing for such traffic with Baltimore, but dominating it. Eliminating shipments to Bethlehem Steel Corporation, which were wedded to the Sparrows Point plant in Baltimore, and disregarding certain tonnage originally consigned to Philadelphia but diverted to Baltimore because of a strike in the Philadelphia port, 299,607 gross tons of Labrador ore were imported through Baltimore. For Philadelphia, in-

cluding the strike-diverted cargoes, the Labrador imports were 744,940 gross tons, none of which was consigned to the Morrisville plant of U. S. Steel. 114,318 gross tons of the Baltimore total were consigned to differential territory beyond the seventeen points involved in this litigation.

The plea of iron ore consumers that they should have more than one port of entry is the basis on which the I.C.C. reached its fast conclusion that parity rates should be compelled. We do not quarrel with the desire of the ore consumers to the extent that rates are adjusted so that *over-all*, from point of foreign origin to point of destination in differential territory, the shipment costs for iron ore are the same regardless of which port of entry is employed. Under such circumstances, but only under such circumstances, can Baltimore fairly compete as one of several alternate ports of entry available to the shippers. While superficially the idea of parity rates may convey some impression of equality among the competing ports, as obviously it did for the Interstate Commerce Commission, any thoughtful consideration, such as the Commission refused to give, inevitably reveals that such parity rates actually create competitive inequalities between the ports. Where there are ocean transportation considerations which favor one port over another, unless they are counterbalanced by differences in the overland rate the port with disadvantage from an ocean point of view is bound to come out second best in competition for the trade.

Baltimore's disadvantage vis-a-vis New York, in so far as steaming distances from Labrador are concerned, is so evident and undeniable that a parity in rail rates, regardless of the overland distances, manifestly cannot create equal opportunities of competition. When this consideration is added to the great disparity in Baltimore's favor of

overland distances to differential territory, there is no other alternative to the conclusion reached by the Court below that rates from New York exactly equal to those from Baltimore go lower than is necessary to meet competition. Once that is realized, it further inescapably follows that the I.C.C. was in error when it made a pretense of determining the reasonableness of the rates from the two ports as though they were independent questions and found a new New York rate reasonable, but struck down as unreasonable a Baltimore rate 20 cents less for 112 miles* less in haul. The earnings which the "unreasonable" Baltimore rate would produce were substantially greater than those under the "reasonable" New York rate. To Youngstown, Ohio, the typical destination, a $2.71 rate from New York would produce 34.3 car-mile cents and 5.5 ton-mile mills. A $2.51 rate from Baltimore would produce 41.2 car-mile cents and 6.6 ton-mile mills. (The Philadelphia $2.71 rate, 20¢ higher than the Baltimore rate, also would produce lower earnings: 39.6 car-mile cents, 6.4 ton-mile mills.)

The lower court was, therefore, correct in concluding that it was unequal and arbitrary for the Commission to uphold in one breath a $2.71 New York rate and strike down a $2.51 rate from Baltimore. The approval of the New York rate would require the approval of the lower Baltimore rate, if the Commission's action was to be proper. There was, consequently, no basis for upholding the decision approving the New York rate when the decision was grounded on a belief that parity should be compelled between the ports. The court correctly concluded that on the only reasonable findings which could be made from the

* This distance disparity is based on short line comparisons. If short tariff distances are compared, the distance from Baltimore is less by 188 miles.

evidence submitted to the Commission, New York could fairly compete with Baltimore, despite some differential in the rates reflecting the advantage ocean-wise of New York and the shorter distance from Baltimore.

In the case of Philadelphia, it is our belief that the same considerations should have led the court to conclude that Philadelphia could also compete with Baltimore although the rates were differentially related. However, the court concluded that here further study should be made by the Commission. From this we gather that the court believed that, as a matter of degree, perhaps the lesser ocean advantages and land distance differences between Philadelphia and Baltimore might justify a differential rate at less than the historic 20 cents per ton. In this connection, the court was faced with the problem of upsetting a *status quo*, a parity rate which had gone into operation from Philadelphia despite the pendency of these proceedings. We confidently expect that on further consideration by the Commission, in view of the compelling nature of the evidence, it will agree that a differential rate structure creates the desirable equal competitive situation between Baltimore and Philadelphia.

The District Court has correctly exposed the principal fallacy underlying a conclusion that equal rates are justified between Baltimore and Philadelphia. The Commission apparently (although again its failure to make definite findings renders determination of just what it relied on difficult) gave weight to the Pennsylvania Railroad's argument that its actual hauling route from Philadelphia was only eleven miles greater than its actual hauling route from Baltimore. The fallacy in this argument lies in the fact that the Pennsylvania is the short line, the most direct route, from Philadelphia to differential territory, while it

is the most circuitous from Baltimore. Comparison of its Philadelphia distance with the short line distance from Baltimore makes the disparity forty-six miles.

It is obvious that between fixed points of origin and destination, for competitive reasons, differences in railroad distances are to be ignored. Thus, *from Baltimore*, the Pennsylvania properly is allowed the same rate as the Western Maryland despite the difference of 23 miles (short tariff route comparison, 42 miles by actual operation comparison). Because, however, that distance is disregarded to allow competition between railroads serving Baltimore, it in no way follows, unless boot-strap logic is relied on, that the same distance difference should be disregarded in relating the rates between two different and competing points of origin, Philadelphia and Baltimore. In the latter case other factors affecting competition enter and in this instance those other factors are controlling ones for purposes of determining the reasonableness of parity rates between the ports. Philadelphia has an ocean advantage which Baltimore cannot match if rail rates are identical.

This argument of the Pennsylvania Railroad as to ignoring distances between Baltimore and Philadelphia because of the length of its hauls from the two ports only would support a contention that the Pennsylvania's rate from Baltimore should be higher by the appropriate differential between Philadelphia and Baltimore than the rates of the other Baltimore railroads. Such a result, of course, would not be proper because it would affect the Pennsylvania's ability to compete for the traffic originating in Baltimore. The absurdity of the logical conclusion deriving from the argument, however, demonstrates the absurdity of the argument itself.

In all events, the question of the lawfulness of a parity rate from Philadelphia should abide further consideration of the matter by the Commission and it is hardly a matter at this preliminary stage to take the time of the Supreme Court. After further consideration by the Commission and any action, following such further consideration, by the lower court, it will be time enough to consider the issues with respect to the port relationship between Baltimore and Philadelphia.

In conclusion, we wish to emphasize that experience on the Great Lakes with equal rates from several ports is no justification for the conclusions of the I.C.C. here. There are numerous considerations which make the domestic situation an inappropriate analogy for import ore rail rates. In the first place, the steaming distances in Lake Erie to the various ports differ to such a slight extent that it is far more appropriate to ignore them than to ignore the substantial and, indeed, critical ones between New York and Philadelphia, on the one hand, and Baltimore on the other. Similarly the overland distances are less, and differentials are inappropriate for the same reasons that differentials are not maintained from North Atlantic ports to points in trunk line territory, i.e. east of Pittsburgh. As distances shorten they give way, as the paramount rate making considerations, to terminal costs.

Appellants have cited as a vital consideration language of *Iron Ore Rate Cases,* 41 I.C.C. 181, 215 (1916), relative to the advantages of equal rates from lake ports to steel furnaces. What they refrain from pointing out is the important fact that the Commission was in no way there concerned with the question of inter-port competition. Rather involved was the issue of whether equalization of rates, *on the basis of destination points,* should be main-

tained and extended. The Commission concluded that competitive desires of the various steel producers to equalize raw material costs did not justify the establishment of rates which ignored factors of advantageous geographic location. Having so concluded, the Commission was then faced with the necessity of justifying the existing apparently inconsistent practice, *established by the railroads on a voluntary basis, and in no way attacked in the proceeding*, of lake port equalization. It addressed itself to the question only to explain away an apparent logical inconsistency of the action it was taking as compared to an established practice, not involved in the hearing. Its remarks can in no way be construed as favoring an involuntary port equalization which ignores natural geographic location. The gravamen of the holding in that case was that geographical advantages must be given effect in rate making.

CONCLUSION

The District Court was fully justified in holding that the Commission's order was not based on adequate findings. For this reason, the decision below should be affirmed.

Respectfully submitted,

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